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RECENT DEVELOPMENTS

ZONING — ZONING LEGISLATION FOR SOLELY AESTHETIC PURPOSES HELD NOT WITHIN THE POLICE POWERS OF THE STATE WITH CERTAIN SPECIFIED EXCEPTIONS. *MAYOR AND CITY COUNCIL OF BALTIMORE V. MANO SWARTZ*, 268 Md. 79, 299 A.2d 828 (1973).

With the advent of the large, urban, metropolitan centers at the turn of the twentieth century, a need arose to regulate and control further growth of the cities. Zoning soon developed as an effective device to meet this need. Some people, believing that the beauty of our cities is similarly deserving of municipal control, have espoused the opinion that such ends should be achieved through the use of aesthetic zoning. These endeavors have been the subject of considerable litigation in which the constitutionality of zoning for aesthetic purposes has been challenged. *Mayor and City Council of Baltimore v. Mano Swartz*,¹ a recent Maryland case considering this controversy, adopts the majority view of invalidating such legislation, thereby rejecting a recent trend toward recognition of aesthetic zoning as a proper legislative tool.

Encouraged by its success in limiting both the size and design of signs in the Charles Center project,² the City of Baltimore enacted an ordinance³ expressly intending to achieve similar results in the re-

1. 268 Md. 79, 299 A.2d 828 (1973).

2. These objectives had been accomplished through the use of leasehold restrictive covenants rather than zoning devices. The City, which had previously acquired ownership to the land, either by purchase or condemnation, executed leases with private developers whose construction plans were regulated by the limitations of these restrictive covenants. One such lease (for the block bound by Charles, Redwood, Hanover and Baltimore Streets — block #647) contained the provision that prior to construction the developer, the Charles Center Theatre Building, Inc., had first to obtain the approval of the Baltimore Urban Renewal and Housing Agency with regard to the specifications of the construction plans. It was agreed as follows:

The Agency shall have the right to refuse to approve any such drawings, plans or specifications that are not suitable or desirable, in its opinion, for aesthetic or functional reasons, and in so passing upon such drawings, plans and specifications, it shall have the right to take into consideration . . . the harmony thereof with the surroundings, and the effect of the building or other structures, as planned, on the outlook from other portions of the Charles Center Project.

Lease, Executed August 5, 1964 & Recorded January 4, 1965 among the Land Records of Baltimore City in Liber J.F.C. 1818, folio 423, 436. The conveyance further contained restrictions pertaining to the use permitted on the land (e.g., correctional or penal institutions, dog pounds and funeral homes were prohibited), and on the height of the buildings to be constructed thereon. With regard to signs the lease provides: "No sign which is to be seen from the exterior . . . shall be permitted to be erected . . . unless and until said sign has been approved in writing by the Agency." *Id.* at 437-38.

3. Baltimore, Md., Ordinance 663, November 1, 1965; now BALTIMORE, MD., CODE art. 1, § 39 (1966).

mainder of the downtown area of the City.⁴ The ordinance was "[d]esigned and intended to provide for beauty, attractiveness, esthetics, [and] symmetry in . . . commercial signs . . . and to relieve conditions of gaudiness and drabness in certain portions of the defined area."⁵ To achieve this end, the ordinance banned erection of signs on the roof of any building and prohibited signs which extended more than twelve inches from the surface of any building.⁶ A five year moratorium was established to allow merchants with nonconforming signs either to correct or to remove them.⁷ On October 30, 1970, shortly before the expiration of the grace period, Mano Swartz, Inc. and nine other firms operating in the affected area filed a bill seeking to enjoin the enforcement of the ordinance.⁸

Mano Swartz contested the constitutionality of the ordinance on the theory that laws passed solely for aesthetic purposes do not promote the public health, safety, welfare or morals and consequently do not fall within the purview of the police power.⁹ The City replied that the right to erect signs is not a vested property right¹⁰ and that control

4. The downtown area is defined as "the area bounded on the outer limits, respectively, of Center Street on the north, Pratt Street on the south, the Fallsway on the east, Greene Street on the west, and Druid Hill Avenue on the north-west." BALTIMORE, MD., CODE art. 1, § 39(c) (1966).

5. *Id.* § 39(d).

6. Section 39(e) stated in full:

It shall be unlawful, within the area described, (1) for any commercial sign, billboard, or other advertising structure or device to project outward from the primary surface of the building to which it is attached for a distance of more than 12 inches. The commercial sign, billboard, or other advertising structure or device shall be single-faced and shall not project above the top of the vertical wall of the building to which it is attached; (2) to erect any flashing, animated, or rotating sign; (3) for any commercial sign, billboard, or other advertising sign or device to be permitted or erected on the roof of any building; (4) for any commercial sign, billboard, or other advertising structure or device to be painted on any exterior wall of a building except as a substitute for a sign on the primary facade of said building.

Id. § 39(e).

7. *Id.* § 39(g).

8. A fine was established in § 39(i) of "not less than twenty-five dollars (\$25.00) and not more than one hundred dollars (\$100.00) for each violation. Each day upon which a violation continues may be construed as a separate offense." *Id.* § 39(i).

9. 269 Md. 79, 85, 299 A.2d 828, 831-32 (1973). The term "police power" is generally defined to be the power of the sovereign to enact laws, within constitutional limits, to protect the health, morals, safety and general welfare of the community and its subjects. Unlike condemnation proceedings, those affected by zoning legislation are not compensated for the deprivation of the use or enjoyment of their property by the state. *See, e.g., LaRoque v. Board of County Comm'rs of Prince Georges County*, 233 Md. 329, 196 A.2d 902 (1964); *Jaime Gonzales A. v. Ghingher*, 218 Md. 648, 145 A.2d 769 (1958); *Burley v. City of Annapolis*, 182 Md. 307 (1943).

Police power is delegated to the respective municipalities from the state to be used in lieu of specific statutory or constitutional provisions. Certain limitations have been placed upon the use of this power. . . . The primary limitation is that its exercise serve a public and not a private interest. Further, it must be rationally formulated, impartially administered, and the means must be appropriate for the desired purpose.

Masotti, Aesthetic Zoning and the Police Power, 46 J. URBAN L. 773, 774 (1969) (citations omitted).

10. Section 214 of the Baltimore Code establishes mandatory safety requirements for the use of

over them is a necessary and proper function of the police power.¹¹ The Circuit Court of Baltimore City held for the complainants, thereby invalidating the ordinance. On appeal, the City's position was again rejected on the theory that a zoning ordinance of this nature, enacted strictly for aesthetic purposes,¹² is not a permissible use of the police power.¹³ The Court of Appeals reasoned that because aesthetic considerations depend on human sensibilities they are necessarily incapable of objective treatment and are subject to arbitrariness and vagueness.¹⁴ In concluding that the ordinance was invalid, the court made no attempt to determine whether the standards imposed thereby were capable of an objective treatment.

The concept of zoning as a proper and valid function of the police power is well established.¹⁵ Although one's right to the beneficial use and enjoyment of his property is a basic tenet of our legal system, it is also well established that restrictions on use may be promulgated for

signs, but there are none, with the exception of those mentioned in art. 1 § 39, which control their aesthetic quality. However, the Code does provide, § 499 that "[a] Minor Privilege permit approved by the Board of Estimates is required for all signs on or over any street, alley, or other public way or property owned by the Mayor and City Council of Baltimore . . ." BALTIMORE, MD., CODE § 499 (1966). *Mano Swartz* expressed no opinion as to whether the City could achieve its objective through the exercise of this power by denying such a permit to a business on the sole ground that their sign was determined to be aesthetically unfit. 268 Md. at 85, 299 A.2d at 831.

11. 268 Md. at 85-86, 299 A.2d at 832.

12. It was conceded by all parties that Ordinance 663 was enacted for aesthetic reasons. The purpose of the Ordinance, "to provide for the beauty, attractiveness, and esthetics" was stated quite clearly in art. 1, § 39(d) of the Code. Additionally, while testifying before the lower court, an architect directly involved in the drafting of the ordinance testified that aesthetic considerations guided the drafting.

13. Aside from the defects found in the City's argument on the merits of aesthetic zoning, the court also held that the Ordinance, being an amendment to the zoning law, "was enacted without complying with the substantive and procedural requirements of the Zoning Enabling Act, Maryland Code (1957, 1967 Repl. Vol.) Art. 66B, in effect at the time." Mayor and City Council of Balto. v. *Mano Swartz*, 268 Md. 79, 91, 299 A.2d 828, 834 (1973). This conclusion was based on the following reasons:

The Ordinance failed to heed the mandate of sec. 3 that it be in 'accordance with a comprehensive plan' or that of sec. 2, that it be 'uniform for each class or kind of building throughout each district'; nor was sec. 5, which requires public hearings and at least 15 days' notice, complied with.

Id. at 91, 299 A.2d at 834-35.

14. The court reasoned:

The principle difficulty is that other forms of pollution, stench and noise and the like, can be measured by more nearly objective standards. If beauty, however, lies in the eyes of the beholder, so does the tawdry, the gaudy and the vulgar — and courts have traditionally taken a gingerly approach to legislation which circumscribes property rights by applying what amount to subjective standards which may well be those of an idiosyncratic group.

Id. at 91, 299 A.2d at 834-35.

15. In *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), the Supreme Court held that zoning legislation would be upheld providing it was not arbitrary or unreasonable and had some relation to the preservation of the public health, safety, morals or welfare. This doctrine was also enunciated in *County Comm'rs of Anne Arundel County v. Ward*, 186 Md. 330, 46 A.2d 684 (1946).

the public good.¹⁶ Zoning has historically proven to be an effective device to implement the interests of society.¹⁷

Initial attempts to incorporate aesthetic considerations within the objectives of the zoning power were generally denounced by the courts because questions of beauty were not believed to be of sufficient importance for the state to invoke its police powers.¹⁸ This view, with various modifications and exceptions has survived as the majority opinion throughout the nation.¹⁹

Two reasons have generally been advanced by the courts for their refusal to uphold legislation enacted for purely aesthetic purposes. First, it has often been held that aesthetic considerations do not fall within the constitutional limitations placed on the zoning power that such legislation promote the health, safety, morals or general welfare of the community.²⁰

Zoning restrictions based on aesthetic values have been further attacked on the grounds that they lacked uniformity and were based on arbitrary standards. Those advocating this belief reasoned that differences of tastes and ideas do not lend themselves to objective standards:

Successive city councils might never agree as to what the public needs from an aesthetic standpoint, and this fact makes the aesthetic standard entirely impractical as a standard for use restriction upon property. The world would be at a continual seesaw if aesthetic considerations were permitted to govern the use of the police power.²¹

Most states follow this view generally, but many jurisdictions have modified their position to various degrees. For instance it has often been decreed that although aesthetic considerations alone cannot form

16. *City of Miami Beach v. Ocean & Inland Co.*, 147 Fla. 480, 3 So. 2d 364 (1941). *See also* *Carney v. City of Baltimore*, 201 Md. 130, 93 A.2d 74 (1952).

17. 1 R. ANDERSON, *AMERICAN LAW OF ZONING* 23 (1938).

18. *See, e.g.*, *Welch v. Swasey*, 214 U.S. 91 (1909); *Willison v. Cooke*, 54 Colo. 320, 130 P. 828 (1913); *Goldman v. Crowther*, 147 Md. 282, 128 A. 50 (1925); *Commonwealth v. Boston Adv. Co.*, 188 Mass. 348, 74 N.E. 601 (1905); *Quintini v. City of Bay St. Louis*, 64 Miss. 483, 1 So. 625 (1887).

19. To date, Florida (*City of Miami Beach v. Ocean & Inland Co.*, 147 Fla. 480, 3 So. 2d 364 (1941)), Hawaii (*State v. Diamond Motors, Inc.*, 50 Hawaii 33, 429 P.2d 825 (1967)), New York (*People v. Stover*, 12 N.Y.2d 462, 191 N.E.2d 272, *appeal dismissed*, 375 U.S. 42 (1963)), and Oregon (*Oregon City v. Hartke*, 240 Ore. 35, 400 P.2d 255 (1965)) have been the only states to unequivocally hold that aesthetic purposes, by themselves, are sufficient basis for zoning legislation.

20. In *City of Passaic v. Patterson Bill Posting, A. & S.P. Co.*, 72 N.J.L. 285, 62 A. 267 (1905), the court considered the validity of an ordinance enacted by the city of Passaic, New Jersey to regulate the placement of signs. The court held that whereas zoning laws promoting the safety of the community would be upheld, those with aesthetic purposes would not: "Aesthetic considerations are a matter of luxury and indulgence rather than of necessity, and it is necessity alone which justifies the exercise of the police power to take private property without compensation." *Id.* at 287, 62 A. at 268.

21. *City of Youngstown v. Kahn Bros. Bldg. Co.*, 112 Ohio 654, 656, 148 N.E. 842, 844 (1925).

the basis for a state exercising its police power, they may be taken into account as a minor or incidental reason.²² Another example is the "character of the district" criterion in which, as its name suggests, particular attention must be given to the area which the particular zoning ordinance would effect.²³ A third position, which has been adopted in a few states, is that aesthetic factors alone are a sufficient basis for zoning, but these courts have generally found a relation between the aesthetic consideration and other factors, most notably economic ones,²⁴ which have traditionally been recognized as valid exercises of the police power.²⁵

There does exist a contrary view to these beliefs. A small minority of the states have held that zoning for aesthetic purposes alone should be upheld under the auspices of the "general welfare" of the community. The theory underlying this viewpoint is that the enhancement of the beauty of a district would benefit the public as a whole and therefore is a valid exercise of the police power.

The Supreme Court accepted this view in *Berman v. Parker*.²⁶ Although involving a law enacted by Congress which condemned a blighted area, pertaining to an urban renewal project in Washington D.C., rather than a zoning ordinance, *Berman* has significance in that the Court expressly recognized that the concept of the "general welfare" of a community is sufficiently broad to encompass aesthetic considerations. The Court ruled:

The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. . . . If those who govern the District of Columbia decide that the Nation's Capital should be beauti-

22. See, e.g., *National Advertisement Co. v. County of Monterey*, 211 Cal. App. 2d 375, 27 Cal. Rptr. 136 (1962); *Murphy, Inc. v. Westport*, 131 Conn. 292, 40 A.2d 177 (1944); *Stoner McCray System v. City of Des Moines*, 247 Iowa 1313, 78 N.W.2d 843 (1956); 122 Main Street Corp. v. Brockton, 323 Mass. 646, 84 N.E.2d 13 (1949); *Piscitelli v. Township Comm. of Township of Scotch Plains*, 103 N.J. Super. 589, 248 A.2d 274 (1968).

23. E.g., *Grant v. Mayor and City Council of Baltimore*, 212 Md. 301, 129 A.2d 363 (1957); *Livingston Township v. Marchev*, 85 N.J. Super. 428, 205 A.2d 65 (1964). See also Masotti, *supra* note 9, at 788.

24. The use of "economic factors" in upholding aesthetically aimed legislation is in reality "escapist reasoning." A decrease in the market value of a neighborhood is symptomatic of the decline in its aesthetic appeal created by an "eyesore." When the attractiveness of an area deteriorates, this fact becomes manifested as its economic value similarly declines. Michelman, *Towards a Practical Standard for Aesthetic Regulation*, 15 PRAC. LAW. 37 (1969). "The decline in market value, therefore, ought to be regarded as a kind of socially computerized, objective evidence that the regulated activity is by a social consensus deemed intrinsically ugly, negatively suggestive, or destructive of prior existing beauty." *Id.* at 37.

25. See, e.g., *Civello v. City of New Orleans*, 154 La. 271, 97 So. 440 (1923); *City of New Orleans v. Levy*, 223 La. 14, 64 So. 2d 798 (1953).

26. 348 U.S. 26 (1954).

ful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.²⁷

Similar reasoning was advantageously employed in *City of Miami Beach v. Ocean & Inland Co.*²⁸ There the court upheld legislation designed to prohibit the erection of commercial facilities in an area theretofore used for recreational activities. The court noted:

It is fundamental that one may be deprived of his property without due process of law, but it is also well established that he may be restricted in the use of it when that is necessary to the common good. So in this case we must weigh against the public weal plaintiff's rights to enjoy unhampered property.

...²⁹

With this principle established, the court felt justified in upholding the ordinance, relating Miami Beach's beauty and attractiveness to its general welfare. "It is difficult to see how the success of Miami Beach could continue if its aesthetic appeal were ignored because the beauty of the community is a distinct lure to the winter traveler."³⁰

While some jurisdictions have recognized that the concept of beauty for its own merits is deserving of municipal control, there have been numerous decisions which have attempted to camouflage the inherent aesthetic issues under the veil of public health and safety.³¹ These decisions have attempted to rationalize legislation clearly enacted for the maintenance and improvement of community appearance. An ex-

27. *Id.* at 33.

28. 147 Fla. 480, 3 So. 2d 364 (1941).

29. *Id.* at 485, 3 So. 2d at 366. Although the "character of the district" involved was discussed, it was not of primary importance in the decision.

30. *Id.* at 487, 3 So. 2d at 367. This position was recently adopted in *State v. Diamond Motors, Inc.*, 50 Hawaii 33, 429 P.2d 825 (1967), where the court considered the validity of an ordinance restricting outdoor advertising signs for aesthetic reasons. The court held: "[T]he application of the ordinance to appellants constituted a regulation for the public welfare under the City's police power in a legitimate field for legitimate aesthetic reasons and that it does not constitute a taking of private property without the payment of compensation." *Id.* at 38, 429 P.2d at 828.

31. *St. Louis Gunning Advertisement Co. v. City of St. Louis*, 235 Mo. 99, 137 S.W. 929 (1911). See also *Oscar P. Gustafson v. City of Minneapolis*, 231 Minn. 271, 42 N.W.2d 809 (1950), wherein the court, while recognizing the aesthetic issues, based their decision upholding an ordinance banning overhanging signs on health and safety factors. The court noted: "An overhanging sign, for instance, extending over every 25 foot store front along a retail street would be an obstruction to light and view and would have potentialities of danger." *Id.* at 277, 42 N.W.2d at 812.

Mano Swartz similarly adopts such reasoning. Although it invalidated Ordinance 663 due to its aesthetic nature, the court strongly hinted that the legislation would have been upheld had the City changed its "supposed" intention when it had enacted the law. The court noted: "The City might well have prevailed had the legislative intent been the elimination of signs or pennants which distracted motorists... or the promotion of highway safety.... The fact that another result might have been one which was aesthetically pleasing would not necessarily have imported an element of constitutional infirmity." 268 Md. at 87, 299 A.2d at 832-33.

ample of such maneuvering is found in *St. Louis Gunning Advertisement Co. v. City of St. Louis*.³² There the court considered the validity of legislation prohibiting the use of billboards along certain highways. Signboards were banned because:

[T]hey endanger the public health, promote immorality, constitute hiding places and retreats for criminals and all classes of miscreants. . . . [and] are also inartistic and unsightly. In cases of fire they often cause their spread and constitute barriers against their extinction; and in cases of high wind, their temporary character, frail structure and broad surface, render them liable to be blown down and to fall upon those who may happen to be in their vicinity. . . . [T]he ground in the rear thereof is being constantly used as privies and dumping ground for all kinds of waste and deleterious matters, and thereby creating public nuisances and jeopardizing public health . . . [T]he lowest form of prostitution and other acts of immorality are frequently carried on, almost under public gaze; they offer shelter and concealment for the criminal while lying in wait for his victim; and last, but not least, they obstruct the light, sunshine, and air, which are so conducive to health and comfort³³

The ordinance, the purpose of which was obviously aesthetic, was upheld, but the court's rationale totally circumvented the real issues.

Mano Swartz does not unequivocally hold that aesthetic considerations can never be a sufficient basis for zoning legislation. Preservation of areas of historical or architectural significance are functions properly within the exercise of the police power.³⁴ *Garrett v. James*,³⁵ cited by the court in *Mano Swartz*, considered the validity of an ordinance which permitted the erection of "porticoes, steps, or other ornamental structures" on Mount Vernon Place for a distance not to exceed nine feet. It was contended that the act was inconsistent with an earlier ordinance which would have prohibited such an extension from the building. The court reconciled the two laws on the ground that Mount

32. 235 Mo. 99, 137 S.W. 929 (1911).

33. *Id.* at 110, 137 S.W. at 942.

34. MD. ANN. CODE art. 66B, § 8.01(a) (1970), known as the "Maryland Planning and Zoning Enabling Act," declares "the preservation of structures of historic and architectural value . . . [to be a] public purpose" The rationale for this ordinance was stated in § 8.01(b) of the same article:

The purpose of an ordinance or resolution in any county or municipal corporation shall be (1) to safeguard the heritage of the county or municipal corporation by preserving the district therein which reflects elements of its cultural, social, economic, political, or architectural history . . . (3) to foster civic beauty . . . and (5) to promote the use and preservation of historic districts for the education, welfare, and pleasure of the residents of the county or municipal corporations.

Id. § 8.01(b).

35. 65 Md. 260, 3 A. 597 (1886).

Vernon Place is an area of architectural distinction, and is thereby entitled to aesthetic consideration by the law-makers.³⁶

The court further declared that legislation may be enacted to prevent the visual pollution of areas which the public generally regards as aesthetically pleasing. The court stated: "[E]mphasis should be laid upon the character of the place as having an established claim to consideration and upon the idea of disfigurement as distinguished from the falling short of some standard of beauty."³⁷ In effect, areas which are unblighted or aesthetically pleasing can be proper subjects of legislation motivated to preserve their naturalness and beauty,³⁸ but the legislature may not use the zoning power to upgrade the visual character of a neighborhood. Thus, Maryland clearly falls within the majority view which advocates that consideration should first be given to the "character of the district" before a determination can be made on any legislative endeavors aimed at controlling its visual appeal.

By ruling that the enhancement of the aesthetic appeal of an area, absent other factors, does not fall within the realm of promoting the "general welfare" of the community,³⁹ *Mano Swartz* has chosen to affirm long-established precedents rather than examining the current needs of our cities. This unyielding adherence to stare decisis is inadequate to cope with the immediate problems of society.

Increasing awareness of one's environment in the last decade has resulted in a shifting of man's attitudes—one of which is that it is equally undesirable to live in an aesthetically blighted neighborhood as it is near a structure that offends one's olfactory nerves⁴⁰ or audio senses.⁴¹ In *Preferred Tires v. Village of Hempstead*⁴² such changing of priorities was recognized and accepted. That case, like *Mano Swartz*, involved an attempt by the local legislative body to prohibit the hanging of all types of signs "from the face of any building over any sidewalk, street, highway or alley." Although the facts of the two cases

36. See also *Cochran v. Preston*, 108 Md. 220, 70 A. 113 (1908) cited in *Mano Swartz*.

37. 268 Md. at 92, 299 A.2d at 835, quoting from E. FREUND, STANDARDS OF AMERICAN LEGISLATION 115-16 (1917).

38. Such regions may range from natural forests and parks to the suburbs. The court cited cases where an ordinance which required the removal of billboards from the suburbs (*Grant v. Mayor and City Council of Baltimore*, 212 Md. 301, 129 A.2d 363 (1957)) and cases which banned funeral homes from residential areas (*Ullrich v. State*, 186 Md. 353, 46 A.2d 637 (1946); and *Jack Lewis, Inc. v. Baltimore*, 164 Md. 146, 164 A. 220 (1933)) were upheld. 268 Md. at 91, 299 A.2d at 835.

39. The concluding paragraph of the opinion stated: "Because the purpose of the Ordinance was not the preservation or protection of something which was aesthetically pleasing, but rather was intended to achieve by regulation an aesthetically pleasing result, with no thought of enhancing the public welfare, we shall not disturb the result reached below." 268 Md. at 92, 299 A.2d at 835.

40. See, e.g., *State v. Primeau*, 70 Wash. 2d 109, 422 P.2d 302 (1967), which examines the issue of disturbing odors caused by a piggery.

41. See, e.g., *Muehlman v. Keilman*, 272 N.E.2d 591 (Ind. 1971), dealing with the problems of noise pollution resulting from the racing of a truck's diesel engines throughout the day and night.

42. 173 Misc. 1017, 19 N.Y.S.2d 374 (Sup. Ct. (1940)).

are similar, the holdings are diverse. In *Preferred Tires* the ordinance was upheld for the sole reason that the enhancement of the aesthetic appeal of the village would help result in a higher quality of life for its inhabitants. The court commented:

For years the courts have strained to sustain the validity of regulatory or prohibitory ordinances of this character upon the basis of the public safety. They decided that aesthetic considerations could afford no basis for sustaining such legislation. . . . But the views of the public change in the passing of years. What was deemed wrong in the past is looked upon very often today as eminently proper. What was looked upon as unreasonable in the past is very often considered perfectly reasonable today. Among the changes which have come in the viewpoint of the public is the idea that our cities and villages should be beautiful and that *the creation of such beauty tends to the happiness, contentment, comfort, prosperity and general welfare of our citizens.*⁴³

Although man's right to possess and use his property is still a fundamental concept of our legal system, it is equally understood that such use must be tempered so as not to injure society as a whole:

Activity is beyond governmental concern if only the agent is significantly affected by it. But if his behavior radiates external impacts on other people, then public intervention is legitimate.

. . . . An owner's insistence on creating what his neighbors regard as ugliness, altering their preferred tone of the neighborhood, spoiling their enjoyment of a favored view—all these things plainly affect persons other than himself.

The owner would be imposing unilaterally, what could be called a redistribution of welfare from his neighbors to himself. This is precisely the kind of situation in which the government is normally permitted to arbitrate.⁴⁴

The use of aesthetic zoning as a tool in city planning has long been recognized.⁴⁵ It becomes particularly significant when used in conjunction with the redevelopment of a large metropolitan area. Implemented properly, such planning will "further the welfare of the people in the city . . . by aiding in the creation of a more efficient, healthful and attractive environment"⁴⁶

43. *Id.* at 1019, 19 N.Y.S.2d at 377.

44. Michelman, *supra* note 24, at 38-39. See also *Oregon City v. Hartke*, 240 Ore. 35, 400 P.2d 255 (1965), wherein the court recognized this philosophy: "[T]he inhabitants of the city have the right to forego the economic gain and the person whose business plans are frustrated is not entitled to have his interest weighed more heavily than the predominant interest of others in the community." *Id.* at 50, 400 P.2d at 263.

45. Address by Frederick L. Olmstead, Second National Conference on City Planning and Congestion of Population, May 2, 1910.

46. New York Chapter, American Institute of Planners, *Proposed Alternative Statements*, in

When communities are allowed to expand haphazardly, with no thought to an over-all master plan, aesthetically disjointed and often blighted areas frequently develop as a consequence.⁴⁷ The long-range result of such growth is a diminishing of "land values, assessments and tax returns . . ."⁴⁸ The Charles Center project is an excellent example of how these problems can be controlled when redevelopment plans are drawn with a concern for the aesthetic qualities of a renewed area. The ordinance invalidated in *Mano Swartz* was part of that redevelopment effort. The City wanted to make the business area surrounding the redeveloped area more attractive by eliminating unsightly and in some cases garish signs. It was anticipated that a more aesthetically pleasing downtown would attract people, resulting in more business for merchants and generally a more viable downtown. In view of the intended purpose and anticipated effect of the aesthetic zoning ordinance involved in *Mano Swartz*, it is difficult to understand the court's conclusion that the ordinance does not enhance the public welfare and thus is not a proper object of the police power.

The objection that considerations of beauty are subjective and thus incapable of objective treatment is not without merit. But ordinances based on aesthetic considerations should not be invalidated merely because the standards are difficult to formulate or apply. The courts have allowed the legislatures to attempt to regulate obscenity despite the Supreme Court's inability to define what is obscene.⁴⁹ Unlike obscenity statutes, zoning ordinances do not involve a conflict with First Amendment rights. Thus broad discretion should be given to the legislative bodies to develop standards of what is beautiful. Only when a particular standard adopted by a legislature is so clearly arbitrary as to bear no relation to the public welfare should the court interfere.

The scope of judicial review of legislative enactments is limited. Statutes are presumed constitutional,⁵⁰ and will be invalidated only when they clearly contravene a provision in the state or federal constitutions.⁵¹ An exercise of the police power should be upheld unless it is so arbitrary as to bear no relation to the public health, morals, safety or welfare.⁵² The conclusion of the *Mano Swartz* court that the ordinance there considered bore no relation to the public welfare because its sole

LAND USE PLANNING, A CASEBOOK ON THE USE, MISUSE, AND RE-USE OF URBAN LAND 48 (C. Haar ed. 1959).

47. Descartes, *Discourse on the Method of Rightly Conducting the Reason*, in LAND USE PLANNING, A CASEBOOK ON THE USE, MISUSE, AND RE-USE OF URBAN LAND 77 (C. Haar ed. 1959).

48. Cook, *The Battle Against Blight*, 43 MARQ. L. REV. 444, 446 (1960).

49. *Compare* Roth v. United States, 354 U.S. 476 (1957) and *Memoirs v. Massachusetts*, 383 U.S. 413 (1966) with *Miller v. California*, 93 S. Ct. 2607 (1973).

50. See, e.g., *Baltimore Transit Co. v. Metropolitan Transit Authority*, 232 Md. 509, 194 A.2d 643 (1963); *Woodell v. State*, 2 Md. App. 433, 234 A.2d 890 (1967).

51. See, e.g., *Magruder v. Hall of Records Comm'n*, 221 Md. 1, 155 A.2d 899 (1959); *Searfoss v. School Dist. of Borough of White Haven*, 377 Pa. 604, 156 A.2d 841 (1959).

52. See, e.g., *LaRoque v. Board of County Comm'rs of Prince Georges County*, 233 Md. 329, 196 A.2d 902 (1964); *Burley v. City of Annapolis*, 182 Md. 648, 145 A.2d 769 (1958).

purpose was to achieve "an aesthetically pleasing result"⁵³ is at least questionable. Thus the application of the usual standards of judicial review to the facts of *Mano Swartz* should yield a contrary result.

Mano Swartz is significant in that the court failed to recognize the interrelation between a community's aesthetic appeal and its general welfare. In time, when positions like those advocated in the states which accept aesthetic zoning emerge as the majority rule throughout the nation, a Maryland court will no doubt be swept along in the aftertong. In the intervening years, Maryland will be denied a useful tool in the struggle to enhance the beauty of its cities and to improve the quality of life for its citizens.

Ronald Carroll

UNIFORM COMMERCIAL CODE—DISPOSITION OF COLLATERAL BY SECURED PARTY FOLLOWING DEFAULT REPOSSESSION. *HARRIS V. BOWER*, 266 Md. 579, 295 A.2d 870 (1972).

In *Harris v. Bower*¹ the plaintiff brought an action for an accounting and other equitable relief with regard to the repossession of a boat. Plaintiff's late husband (Harris) purchased the boat in April 1966 from the defendant for \$17,000, giving a promissory note secured by a security interest in the boat. Harris died in June 1969 leaving an outstanding balance due on the boat of the entire purchase price. The defendant refused to accept the boat in satisfaction of the debt since the market value had decreased to \$13,900. In October 1969 the defendant sued to reduce the plaintiff's debt to judgment. A summary judgment was granted for \$21,738. As Harris' estate was insolvent, the defendant repossessed the boat in March 1970 for the purpose of reselling it and applying the proceeds to satisfaction of the judgment. Defendant's efforts to resell in the two years that he held the boat included only one advertisement in a local paper which brought forth only three offers, all for less than the appraised market value.² No advertisements were placed in any trade journals or newspapers.

The plaintiff filed her bill of complaint for an accounting, damages and other relief two years after repossession of the boat by the defendant. The plaintiff contended that the defendant had accepted and retained possession of the boat in satisfaction of the obligation as was one of his options under § 9-505(2) of the Uniform Commercial

53. *Mayor and City Council of Baltimore v. Mano Swartz*, 268 Md. 79, 92, 299 A.2d 828, 835 (1973).

1. 266 Md. 579, 295 A.2d 870 (1972).

2. *Id.* at 582-84, 295 A.2d at 871-72.